

RECAPTION OF CHATTELS: THE USE OF FORCE AGAINST THE PERSON

Cynthia Hawes

Senior Lecturer, School of Law, University of Canterbury. This article was presented as a paper at the annual conference of the Society of Legal Scholars in Keele, UK, September 2006.

Cite as: *Hawes, Cynthia --- "Recaption of chattels: the use of force against the person" [2006] CanterLawRw 9; (2006) 12 Canterbury Law Review 253-272*

I. RECAPTION AT COMMON LAW

INTRODUCTION

Where goods have been wrongfully interfered with, or taken or withheld from the person entitled to their possession, the common law accords to that person a limited right of self-help to retake or protect the goods. Generally speaking self-help, particularly if it involves the use of force, is regarded as undesirable for the reason that it encourages breaches of the peace.[1] This assumes that the public peace is more deserving of protection than an individual's personal property rights;[2] and that the right to be protected against invasion or assault is worth as much as the right of an owner to recover his goods. As Blackstone stated, 'if individuals were once allowed to use private force as a remedy for private injuries, all social justice must cease, the strong would give way to the weak, and every man would revert to a state of nature' .[3] The same point was made more than two centuries later by Lord Hoffmann,[4] who observed that

tight control of the use of force is necessary to prevent society from sliding into anarchy, what Hobbes (Leviathan ch 13) called the state of nature ... [i]n principle, therefore, the state entrusts the power to use force only to the armed forces, the police and other similarly trained and disciplined law enforcement officers. Ordinary citizens who apprehend breaches of the law, whether affecting themselves, third parties or the community as a whole, are normally expected to call in the police and not to take the law into their own hands ... 'the law regards with the deepest suspicion any remedies of self-help, and permits those remedies to be resorted to only in very special circumstances.'[5]

These statements indicate the good reasons for the general view that resort to law is preferable to self-help.

Despite these objections, violent or forceful self-redress to recover or protect goods is excused by the law in some cases. There are obvious reasons why a person who has been wrongfully dispossessed of goods might prefer to take the law into his or her own hands rather than resort to the courts. First, it is cheaper, quicker and perhaps less troublesome than litigation. Judicial

proceedings inevitably require time for preparation, and the goods may be at risk during such delay. If, for example, the goods in question are perishable or likely to be destroyed or on sold,[6] it is clearly advantageous to be able to retake the goods themselves as soon as possible. Even if the goods are not at risk of deterioration or destruction, the recovery of them will not necessarily be achieved by undertaking legal proceedings. The law was, historically, slow to develop remedies enabling orders for the specific return of chattels, although specific restitution was possible in equity.[7] Such orders today remain discretionary; they are not available as of right and are normally granted only in cases where the goods in question are rare or unusual or of particular value to the plaintiff.[8] In the absence of a court order for the return of the goods, the plaintiff might or might not consider damages an adequate remedy; and in any event there can be no certainty in every case that an order for damages will or can be in fact complied with. Accordingly, the simple and direct method of recourse to the goods themselves may have a lot to recommend it in the eyes of a dispossessed owner wishing to 'revert to man's primeval instinct to take the law into his own hands'.[9]

It has been observed that the common law is more tolerant of self-help than are Continental legal systems and that this is for good reasons; given the pressure on courts, and subject to the need to avoid a breach of the peace, '[c]ivilised self-help has the advantages of speed, efficiency, flexibility and cheapness upon which the smooth functioning of business life so much depends'.[10] This view is consistent with the way the common law now stands as far as the peaceful retaking of unlawfully held property is concerned.

THE INTERESTS PROTECTED

In the context of remedies for unlawful removal or interference with goods, the common law generally protects possessory rights. Therefore, where a right of recaption exists, it is not limited in its exercise to the owner of the goods in question; rather, it lies with the person who is entitled to their possession. Ownership may of course carry with it a right of possession and where this is so, an owner may exercise the available rights, which may include recaption, respecting goods which have been wrongfully removed or interfered with. This is not because recaption protects ownership however; it is because it is the right of immediate possession, whether deriving from ownership or some other source, which is protected.[11] So, a bailee or other person with a possessory title may act to recover goods from one who has wrongfully taken them; and this will be justified on the grounds that the bailee or other person exercising the right of recaption has a possessory right in the goods superior to that of the person who has wrongfully removed or detained them. Possession is not just evidence in support of ownership; rather, a possessory title is as good as ownership against all the world except for the true owner.[12]

It follows that in cases where rights of ownership and possession are vested exclusively in different people, the right to take action for unlawful interference with goods will be only with the person who has the possessory interest in the goods and the owner will be excluded. A bailment for a fixed term, for example, comes into this category, for, until the expiry of the term, the owner is not entitled to possession of the goods. It is therefore the bailee who has the right to sue in conversion for damage done to his or her possessory interest in such a case. This

extends to the possibility that the bailee may even sue the bailor if it is the bailor who infringes the bailee's right to possession of the goods.[13] Where goods are taken on hire purchase, for example, the seller has no right to possession of the goods as long as the buyer makes no default in payments, and the seller who wrongfully repossesses goods in such circumstances may be liable in conversion to the buyer, even though the goods are in fact the seller's own property.[14] A mortgagee who has the right to immediate possession of chattels is entitled to bring an action for conversion of chattels; in *Whenuapai Joinery (1988) Ltd v Trust Bank Central Ltd*[15] such a mortgagee bank was successful in its claim in conversion for the value of joinery in the mortgaged property, the joinery having been removed by the seller who had retained title to it under a Romalpa clause. Similarly, in cases where an unpaid seller has a lien, or right to retain possession, over goods until payment is made the unpaid seller is the person with the right to sue in conversion notwithstanding that property in the goods may have passed to the buyer. Again, this is because the unpaid seller has, by virtue of the lien, the right to possession of the goods and therefore the right to exclude the buyer from possession of them until payment is made.[16] An unpaid artificer is similarly entitled to retain possession of the goods to the exclusion of the owner.[17]

If, however, the bailment is one which does not exclude the bailor from possession, such as a simple bailment at will, both bailor and bailee may be able to sue in conversion a third person who interferes with possession of the goods.[18] This is because the bailor in such a case has an immediate right to possession of the goods, because a bailment at will is one which, by its nature, may be terminated at any time. So in *Manders v Williams*[19] casks of porter were delivered by the plaintiff brewers to a customer, the arrangement being that the casks would be returned to the owner when they were empty. The defendant sheriff seized and sold a number of the casks while they were lying empty, but still unreturned, in the customer's cellar. The plaintiffs sued the sheriff in conversion. It was held that the plaintiffs were entitled to succeed because, once the casks had been emptied, the customer became a bailee of them during pleasure, and the rights of property and possession in them reverted to the plaintiffs who were, accordingly, entitled to recover their value from the sheriff. The principle was also applied in *Jelks v Hayward*[20] in which the owners of furniture which had been taken on hire with an option to purchase were held entitled to sue in conversion when the furniture was seized by a bailiff from the hirer, because the agreement provided that if the furniture were to be seized, the owners had the right to determine the hiring immediately and retake possession of it. Similarly, in hire purchase cases, once the seller has acquired a right to repossess goods in consequence of a breach of the hire purchase contract by the buyer, the seller is entitled to sue a third party in conversion. So in *North Central Wagon and Finance Co Ltd v Graham*[21] a buyer who took a car on hire purchase from the plaintiffs fell into arrears with his payments. The agreement permitted the plaintiffs to repossess the car in such circumstances. The buyer, without the knowledge of the plaintiffs and in breach of his obligations, instructed an auctioneer to sell the car. The plaintiffs were held to be entitled to seek damages from the auctioneer in conversion, having acquired a right to immediate possession once the default in payments had occurred.

A bailee or other person relying merely on an entitlement to possession may recover more than the amount of his or her own interest in the goods. In *The Winkfield*[22] the Court of Appeal held that such a plaintiff could recover the entire value of the goods because, '[a]s between bailee and stranger possession gives title - that is, not a limited interest, but absolute and complete ownership, and he is entitled to receive back a complete equivalent for the whole loss or

deterioration of the thing itself'. The same view was adopted in Australia in *Flack v Chairperson, National Crime Authority*.^[23] In New Zealand, in *Trailways Transport Ltd v Thomas*^[24] the principle stated in *The Wakefield* was applied and was said to apply in cases of conversion, detinue, negligence or trespass; and in *Gardiner v Metcalf*,^[25] the Court of Appeal regarded it as applicable in both tort and contract.^[26]

In addition, an owner of goods which are in the exclusive possession of another may recover compensation for damage done to his or her reversionary proprietary interest in the goods. If the goods are, for example, permanently damaged or lost so that no reasonable prospect of recovery exists, a third party who has caused such loss or damage may be liable to the owner of the goods for the value of the owner's reversionary interest.^[27] The claim of the owner against the third party in such a case is not one in conversion, trespass or negligence, for the possessory interest required to bring such actions is not vested in the owner. Rather, a separate action on the case for reversionary damage is available.^[28] So in *Checker Taxicab Co Ltd v Stone*^[29] a taxi which the driver had hired from its owner was damaged in a collision with a third party. It was held that the owner could sue the third party for the damage done to his taxi. Herdman J observed that it was clear that trover would not lie for conversion of a chattel which was out on loan, but an action for permanent injury done to a chattel while the owner's right to possession of it was suspended could be maintained by the owner. This case, and others, emphasise that the damage done must have been such as to permanently injure the interest of the reversioner; therefore no compensation will be payable if the damage was merely temporary, or repair has been effected, or compensation paid.^[30] When these principles are considered, it is not immediately obvious whether an owner of goods who has only a reversionary interest in them may exercise any right of recaption. Clearly, if the goods have been bailed and the term of the bailment has expired, the owner, having regained his or her right to possession, will be able to exercise any allowable rights of recaption against a person in unlawful possession of the goods, including the former bailee. However, it is not clear whether an owner may, during the term of a bailment which excludes him or her from possession, retake goods from a third party into whose hands the goods have come, in order to protect his or her reversionary interest. If so, both the bailee and the owner would be entitled to exercise any available right of recaption against the third party to enable each of them to protect their respective interests in the same goods, that of the bailee being possessory and that of the owner proprietary. There seems no authority on the point. It is suggested as a matter of principle that an owner faced with the possibility of injury to his or her reversionary interest in the goods as a result of their wrongful removal should be treated in the same way as the person entitled to possession of the goods in the context of recaption. Although an owner with a bare proprietary right has by definition only a limited interest in the goods, the same may be said of a bailee whose title is merely possessory. There is no obvious reason to confine rights of recaption only to those who are entitled to immediate possession. If an owner were to effect recaption in such circumstances, the bailee would of course continue to have an entitlement to possession which would prevail over the merely *de facto* possession thereby obtained by the owner.

It seems that such rights of recaption which exist may be exercised by one co-owner against another. Formerly, there was a limitation on the right of one co-owner to sue another in the case where an unauthorised co-owner purported to sell and deliver commonly owned goods but the circumstances were such that property in the goods did not pass to the buyer. The reason for this was that it was considered in earlier cases that the plaintiff's property was not destroyed in

such a case. By contrast, a co-owner could sue for the destruction of the common property or its disposal rendering it impossible for him or her to take or use the property or its proceeds. This anomalous distinction was removed by the Court of Appeal in *Coleman v Harvey*[31] on the ground that it rested on a historical basis which was no longer sustainable; and that '[p]opulation growth, increased industrialisation, the ease of transport, and the very increase in the variety of tangible goods all indicate that if the circumstances in which one co-owner may sue another in conversion are limited in the way suggested in many of the earlier cases he will, as often as not, have no remedy at all'.[32]

Actions which fall short of removal or destruction of a co-owner's rights in the goods are not necessarily tortious, for co-owners are each entitled to make use of the goods in a reasonable way. However, using the goods in a manner which effectively ousts a co-owner from his or her ability to use or enjoy the goods is unlawful.[33] An agreement made by co-owners may also displace the usual rule that they are all entitled to the use and possession of the goods. So in *Nyberg v Handelaar*[34] two co-owners agreed that one of them was to have exclusive possession of a box. Subsequently, the other was given possession of the box for a particular purpose, whereupon he took the box and pledged it with a third party. It was held that this improper pledge immediately restored the first co-owner's right to immediate possession, with the result that the pledgee was guilty of conversion.

In *Leonard v O'Sullivan*,[35] a case in which the defendant co-owner was excluded from using a jointly owned chattel by his fellow co-owners, it was held that the defendant was entitled to take possession of it when the occasion offered. The chattel was not in danger of destruction, but was withheld from the defendant by the co-owners. It was held that because the defendant had been completely ousted by his co-owners from possession, the conduct of the co-owners constituted a trespass; and in consequence the defendant was entitled to retake the chattel to protect his possessory interest in it. The case indicates that a right of recaption is open to a co-owner to protect a possessory interest only, and that it is not necessary, in the co-ownership context, to confine rights of recaption only to circumstances in which proprietary rights are threatened. Accordingly, it is submitted that the law relating to recaption in the case of co-owned goods should not differ from that which applies generally as between parties who are not joint or common owners of the disputed goods.

PEACEFUL RECAPTION

At common law, a person entitled to the immediate possession of a chattel may, with no need for a prior demand, retake it peaceably from a person into whose *de facto* possession it has come. There is 'little doubt'[36] that this is correct; the principle was stated unequivocally by Blackstone[37] and has since been declared in a number of common law jurisdictions. Because recaption may be peaceably exercised by the person entitled to immediate possession, the owner of a lost item is entitled to take it from the possession of, for example, a finder if the finder refuses to deliver it up. The finder in such a case has a possessory title acquired from the mere fact of taking possession; but, although this title gives the finder a right to retain the goods as against a stranger or subsequent wrongdoer, it is inferior to that of the owner. The finder's right must also, of course, give way to that of any other person entitled to immediate possession,

such as a hirer or other bailee. For the same reason, the owner or bailee of goods which have been unlawfully taken from him or her and sold by the thief to an innocent third party may lawfully remove them from that third party.[38] The buyer from the thief in such a case acquires by the transaction no proprietary title to the goods, but has a possessory interest based upon no more than bare, *de facto*, possession of them. In such circumstances the owner or bailee who simply retakes the goods with no associated force or violence commits no wrong for his or her entitlement to immediate possession, deriving from ownership or bailment, prevails over the more limited interest of the buyer.

Thus, at common law the peaceable retaking itself of goods by the person entitled to immediate possession of them is uncontentious. In such a case, there is no risk of any actual breach of the peace. The matter however becomes more complex when the associated conduct of the person who retakes the goods would be, in the absence of a defence of entitlement to possession of the goods, tortious. The question in such a case is not whether the retaking of the goods is itself lawful, but whether the use of associated violence or force such as would otherwise constitute an assault or trespass is justified or excused. Does an entitlement to possession of goods render lawful the use of violence in effecting their recovery? Violence or force may of course take different forms: it may be directed against the person of another, or involve interference with another's chattels or unauthorised entry onto land. Our concern here is with force against the person.

FORCIBLE RECAPTION

The modern common law permits in some circumstances the use of reasonable force against the person of one who wrongfully takes or withholds chattels. This was not always so; in mediaeval times, an owner or possessor who had been deprived of his or her goods was not generally permitted to retake them by force. This reflects the importance which the law placed in this context on possession rather than ownership; *de facto* possession of the goods was vested in the trespasser despite the wrong done in obtaining the goods, and the law protected that possession. An owner who retook his or her own goods by force thereby committed trespass and was generally not entitled to retain them.[39]

It is curious that the mediaeval law, which appears generally to modern eyes to have tolerated or even advocated what today would be seen as violence and barbarism, circumscribed force in this context more narrowly than does the current law.[40] There are two possible reasons which may be suggested for this. First, as described above, the early mediaeval view of ownership was not generally differentiated from the reality of possession. However eventually English law came to recognise the concept of title to goods as a legal abstraction which could be separated from factual or physical possession; and title to goods could pass regardless of whether delivery were effected or not.[41] In consequence, interests in goods could be transferred independently from any change in possession of them. This fact was beneficial to traders but could cause disadvantages as far as unauthorised dealings with goods were concerned, for possession was neither a necessary nor a sufficient condition for the existence of a right to transfer an interest in goods. A second suggested reason for the modern acceptance of force in this context perhaps results from a recognition of the long-standing reality that judicial

remedies for the return of goods may be difficult to obtain or ineffective. In other words, it may be that the modern law which allows a certain amount of violence in recaption has resulted from the inadequacy of legal procedures. There are judicial dicta to this effect: for example Erle CJ, in approving a right of forcible recaption, observed that '[i]f the owner was compellable by law to seek redress by action for a violation of his right of property, the remedy would be often worse than the mischief, and the law would aggravate the injury instead of redressing it' ;[42] and it was aptly remarked by Bankes LJ, in considering the right to retake land from a trespasser, that if self-help were not permitted, 'it must follow that the law confers upon the lawless trespasser a right of occupancy the length of which is determined only by the law's delay' .[43] The same point may be made in the context of recovering chattels.[44]

Whatever the historical reasons might be, it is clear that, despite the mediaeval limitations, the common law had moved by the nineteenth century to permit more force against a wrongdoer for the purpose of recaption,[45] and the difficult questions related, and continue to relate, to the circumstances of its exercise. In particular, it is still today not clear whether the right to use force is limited to the case where the wrongdoer's adverse possession of the chattel was wrongful from its inception. Is there a right of forceful recaption if a person tortiously detaining or using the goods of another originally obtained possession of them lawfully? The starting point in English law on this question is the frequently cited case of *Blades v Higgs*. [46]

It will be remembered that the tort of trespass requires interference of a direct or physical kind with the possession of a plaintiff and, with a few exceptions,[47] the plaintiff must be the possessor of the goods at the time the act complained of occurs. Accordingly, the possession of goods by a trespasser must by definition be wrongful from its inception. This is not necessarily so in the case of conversion or detinue; a person may have obtained goods lawfully, as by a bailment or a finding, but subsequently commit conversion or detinue by using or detaining the goods in defiance of the plaintiff's title. In such a case, the goods may remain in the hands of the defendant throughout, but his or her initially lawful possession of them is at some point rendered tortious by his usurpation or denial of the plaintiff's title. The decision in *Blades v Higgs* indicates that there is no difference between the case where goods are in the possession of one who has obtained them by means of a trespass and other cases of conversion or detinue where the person in adverse possession of the goods has not originally obtained them by a trespassory taking. In other words, adverse possession is in itself, according to *Blades v Higgs* sufficient to justify recaption and it is not necessary to prove how the adverse possession was obtained.

In *Blades v Higgs*, the plaintiff game dealer had obtained dead rabbits which had previously been poached from the Marquis of Exeter, and was about to carry them away and convert them to his own use. The defendant servants of the Marquis, having unsuccessfully requested the plaintiff not to take them away, laid hands on the plaintiff and used force to remove the rabbits from him. The plaintiff contended in the Court of Common Pleas that these acts constituted assault and battery on the part of the defendants. The defendants successfully argued that their acts were justified because the plaintiff had maintained his wrongful possession of the rabbits and force was necessary to effect their recovery. Erle CJ observed that there already existed a rule that a person entitled to possession of a chattel could use force to prevent its being unlawfully taken from his actual possession, but went on to extend the right to the case where the goods were wrongfully in the possession of a person who was not the original taker:[48]

If the defendants had actual possession of the chattels, and the plaintiff took them from them against their will, it is not disputed that the defendants might justify using the force sufficient to defend their right and re-take the chattels; and we think there is no substantial distinction between that case and the present; for if the defendants were the owners of the chattels, and entitled to the possession of them, and the plaintiff wrongfully detained them from them after request, the defendants in law would have the possession, and the plaintiff's wrongful detention against the request of the defendants would be the same violation of the right of property as the taking of the chattels out of the actual possession of the owner.

Therefore, the defence to the claim of assault could be made out without any necessity of showing how the plaintiff originally obtained the property of the defendant and became the holder of it.

It has been suggested that *Blades v Higgs* was a departure from previous law and was wrongly decided.[49] Today the views found in cases and texts differ as to the scope of recaption, and that divergence is reflected in the different approaches which have been taken amongst various common law jurisdictions.

In New Zealand, it has been judicially observed at least twice that although the proposition stated in *Blades v Higgs* has been criticised, it nevertheless is good law. The leading case is *De Lambert v Ongley*,[50] in which the plaintiff claimed damages from the defendant for assault. The defendant had, in consequence of an erroneous belief that the plaintiff had given him a correctly drawn cheque for money owed to him, handed a receipt to the plaintiff. Upon discovering the error, the defendant sought the return of the receipt and, when the plaintiff refused to give it to him, attempted to take it from him by force. The Supreme Court held that the defendant's action in such circumstances was justified, for the plaintiff should have returned the receipt to the defendant when requested to do so. The Court considered that *Blades v Higgs* had been tacitly accepted by the House of Lords as correct,[51] and was supported by leading writers; accordingly, it was 'definite authority' for the right of recaption in such a case.[52] Very recently, in *Slater v Attorney-General*[53] the issue arose again. A company which owned a car hired it on terms that it was entitled to repossess it immediately if it were damaged. The car was observed parked on the roadside in a damaged state with its two occupants, a sub-bailee (S) of the hirer and his friend, drunkenly asleep inside. The owner decided to terminate the agreement and sought the assistance of the police to oust the occupants and retake the car. The police used force and a burst of pepper spray to remove the occupants from the car, and then subdued and arrested them (again using force) for disorderly behaviour and breaches of the peace.

S claimed damages for battery, false imprisonment and related breaches of the *Bill of Rights Act*. The trial Judge upheld the contention of the Attorney-General that the police, acting as the agents of the owner, who had terminated the hire agreement and so become entitled to immediate possession, had been justified at common law in using reasonable force to repossess the car.

On appeal, it was contended for S that the common law defence which the trial Judge had affirmed, deriving from *Blades v Higgs* and applicable in New Zealand as a result of *De Lambert v Ongley*, was too widely expressed and ought no longer to be taken as stating the law. It was undesirable that possession could be resumed by force in a case where the one who retained

possession had come by the goods innocently. S argued that the principle adopted by the New South Wales Court of Appeal three years before in *Toyota Finance Australia Ltd v Dennis*[54] (discussed below) was preferable and ought to be adopted, so that force could be used only against one who was a trespasser from the first, which was not the present case. In his judgment, Keane J observed that the right of recaption as expressed in *Blades v Higgs* 'may well deserve to be revisited in New Zealand'. At the time Sim J had adopted it in *De Lambert v Ongley*, he had recognised while doing so that even then the principle was controversial, but nevertheless it had been tacitly approved by the House of Lords. Keane J commented that although *Blades v Higgs* had been adhered to since, the cases had been infrequent and were all, except for *Toyota*, 'expressions of a different age'. Whether the explicit policy underpinning *Blades v Higgs* ought to enjoy currency any longer was a pertinent question. His Honour observed, citing Fleming,[55] that the forcible recaption was a privilege, and not a right; and the remedy for wrongs lay in the courts. Had the matter arisen in the High Court at first instance, he would have applied that policy and preferred the *Toyota* principle to that of *Blades v Higgs*. However, he was hearing the matter by way of appeal and the trial Judge had not been wrong in basing his decision on *De Lambert v Ongley*. In consequence, that case would continue to state the law in New Zealand until the matter could be revisited by an appropriate court.

By contrast, in Australia, a different approach has been taken, and the breadth of the principle stated in *Blades v Higgs* was rejected by a majority of the New South Wales Court of Appeal in *Toyota Finance Australia Ltd v Dennis*. [56] The facts were that the respondent lessee of a vehicle was in arrears with his payments and the appellant lessor was entitled to repossess the vehicle. The respondent resisted the appellant's attempt to repossess and a struggle for the keys ensued, during which the appellant grabbed and pulled on the arm of the respondent's wife. The issue for the Court was whether this act constituted an assault or was justified by the appellant's right of recaption by force of the vehicle. By a majority (Meagher JA and Sheller JA), the Court declined to follow *Blades v Higgs*, holding that it was not based on precedent and could encourage unnecessary forcible or violent redress. The majority reviewed the law and literature in some detail and concluded that the correct rule was that an owner's right of forcible recaption of unlawfully detained chattels from another was limited to the case where that other's possession was wrongful from its inception. Recaption would therefore have been justified if the vehicle had been initially obtained by the commission of trespass by the respondent. However, the respondent had come into possession of the vehicle with the consent of the appellant under the lease, and his initial possession was therefore not unlawful. Accordingly, the appellant was not entitled to use force to regain possession and his conduct amounted to an actionable assault.

In his strongly argued and equally detailed dissenting judgment, Handley JA observed that *Blades v Higgs* had been treated at the time it was decided as settling the question; it was based upon authority and had been accepted by leading scholars of the day. Further, *Blades v Higgs* had twice been followed by the Full Court of the Supreme Court of New South Wales in *Zimmer v Manning*[57] and *Abbott v NSW Monte de Piete Co*[58] respectively. Handley JA also remarked that, contrary to the view taken by the English Law Reform Committee on the point, there did not exist uniformity amongst modern text writers; rather, they were 'lined up on both sides of the issue'. [59] His conclusion was that *Blades v Higgs* had been correctly decided at the time and subsequently correctly followed, and that the Court should not resile from that view.

In Canada, *Devoe v Long*[60] is frequently cited as the leading case in this context. The New Brunswick Supreme Court in that case rejected the broad principle of *Blades v Higgs* and held that force could not be used against a person unjustifiably holding the chattels of another unless that possession had initially been obtained wrongfully. In that case, a document had been handed by its owner, the defendant, to the plaintiff, who subsequently refused to return it. The owner used force to retrieve it, and the question was whether this self-help was justified in these circumstances. It was held that it was not; the Court considered that *Blades v Higgs* did not apply to the case, for the plaintiff's possession of the disputed document was not unlawful from the outset but was due to the act of the defendant himself, who had handed it to the plaintiff.

It will be apparent that none of the persons in wrongful possession of the disputed goods in these four leading cases was a trespasser. However it is clear that *Blades v Higgs* may be distinguished from the other three cases in regard to the nature of the possession of each wrongdoer. First, in *Blades v Higgs* itself, the person from whom the rabbits were forcibly removed was not the initial trespassing poacher, but the person who had purchased the rabbits from him. His taking possession of them under a purported purchase, in defiance of the defendants' title, constituted conversion and was wrong from its inception. In *De Lambert v Ongley*, the disputed receipt was originally given voluntarily by the defendant to the plaintiff, who thereby came into possession of it with the defendant's consent. His possession was therefore not wrong from its inception, although it became so when he refused to return the receipt and thereby committed the torts of conversion and detinue. In *Toyota Finance*, the person unlawfully detaining the vehicle in question had obtained possession of it under a lease; thus his possession was not unlawful from the beginning, but became so when he refused to return it after a demand was made for him to do so. The facts of *Devoe v Long* are essentially the same as those of *De Lambert v Ongley* where, similarly, the disputed document was handed voluntarily by its owner to the plaintiff whose original obtaining of possession of it was therefore not unlawful.

Accordingly, the only case of the four in which the possession of the person against whom force had been used was unlawful from its inception was *Blades v Higgs* itself. The broad remarks of Erle CJ were of course made in that context, and it may be said that it was not necessary for them to go, or perhaps to be interpreted as going, further than the particular circumstances of the case. However, it will be remembered that Erle CJ held that it was unnecessary for the defendants, in establishing justification for their force, to show how the plaintiff had taken possession of the property and become the holder of it. If this broad principle is regarded as the ratio of the case, the facts of all four cases may be regarded as subsumed within it. In consequence, it may be said that the principle of *Blades v Higgs* has been rejected in Australia and in Canada, is doubtful in England, but is currently the law in New Zealand. The law in New Zealand thus appears to be that, subject to any statutory provisions (which are discussed below), a person entitled to possession of goods may retake them using reasonable force from anyone who is wrongfully holding them; and the lawfulness or otherwise of the initial obtaining of possession is irrelevant.

Whether or not this should today be the law in New Zealand should be a matter of policy, the determination of which should not, it is suggested, depend upon the correctness or otherwise of *Blades v Higgs*. Further, if it should be decided in future cases that *Blades v Higgs* should be limited in New Zealand as it has been in other jurisdictions as described above, it is arguable

that the concept of 'wrongfulness from inception' is not a useful test to apply in this context. This is because such a principle ignores the state of mind of the wrongdoer.

The torts of trespass, conversion and detinue may all be committed unwittingly. Although they are described as intentional torts,[61] this means that they cannot be committed accidentally, and that the act complained of which constitutes the tort in the particular case must have been performed intentionally or deliberately. An inadvertent act in this context is not tortious. However, provided the defendant knowingly performs the act which constitutes the tort, he or she may be liable for any of these torts even though he or she honestly believes the action is justified and has no idea or knowledge of the other party's interest in the goods. Thus, the commission of these torts does not depend upon knowledge or moral fault, but upon where possessory title is allocated in the particular case and whether such title has been interfered with in a manner which the law regards as tortious.

As described above, trespass is always wrongful from its inception because it is committed by a direct and physical interference with the plaintiff's possession. However the state of mind of the trespasser is irrelevant. So, for example, he or she may take the goods dishonestly and the trespass may amount to theft; or the trespasser may mistakenly believe that the goods are his or her own and that he or she is entitled to take them. In both these cases, trespass is committed but the trespasser in the latter case is unaware of his or her lack of right to take the goods. Conversion and detinue similarly do not depend upon knowledge of the true legal position, but may be committed by a person who is acting in the belief that his or her acts are justified.[62] Conversion may or may not be wrongful from its inception for the original taking or using may have been unlawful from the outset or, alternatively, an original lawful possession of goods may subsequently become unlawful; but the conduct is tortious regardless of the wrongdoer's state of mind or beliefs. Similarly, although detinue requires that the detention must be consciously adverse to the other party, it may be committed either by one who mistakenly believes he or she is entitled to detain the goods, or by one who knows well that he or she has no interest in them to justify the detention.

If one is considering the rightness or otherwise of permitting or excusing violence, a criterion which rests upon the state of mind of the wrongdoer might be more useful than that which requires consideration of whether the wrongdoer's possession was originally justified or not. One argument for the 'unlawful from inception' requirement is that lawfulness in such cases frequently derives from the fact that the person entitled to possession of the goods in question has voluntarily given possession of them to the other, as by a loan, hiring or other bailment. When this occurs, it may be argued that the state of affairs has been caused by the voluntary delivery of the goods, and therefore force should not be justifiable to obtain their return.[63] However, this argument is unsatisfactory. If the 'unlawful from inception' criterion is employed, force against the respective wrongdoers in *Toyota Finance and De Lambert v Ongley* would not be justified but, by contrast, the recipient of the rabbits in *Blades v Higgs* could be forcibly handled. This result is undesirable. In the first two cases, the goods were throughout in the hands of the persons converting them, each of whom was aware of his lack of right to retain them; in the latter case, force could be exercised against the purchaser of the rabbits even if he was completely unaware of any other person's right to the goods. Why should a bailee who is aware that he or she has no right to the goods be protected from force, while an innocent purchaser from the bailee is not? Thus, the case for supporting a right of force in *De Lambert v Ongley*, *Devoe v Long* and *Toyota Finance* is strong, for in all of those cases the force used was

against people who were aware of their lack of right to the goods. No confusion or misunderstanding existed in the minds of any of them and in each case the disputed chattel in each case had been in the hands of the one individual tortfeasor throughout. By contrast, a person in the position of the game dealer in *Blades v Higgs* should, it is suggested, be subject to force (if it is permitted at all) only if he had bought the rabbits with the knowledge that they had been poached. Such a person, having had no direct dealings with the person entitled to possession, and having acted honestly, is unaware of the previous dishonest taking or dealing with the goods; and, even when the facts are known, it may be that the law (for example, the exceptions to the *nemo dat* rules) operates to confer entitlement to possession or ownership on him or her. In other words, it is arguable that a genuine belief in the existence of an entitlement to possession should protect from the use of force a tortfeasor who is unaware that his or her possession is unlawful.

This view is to some extent supported by Branson, who considered that forcible recaption might be exercised against 'all those who possess without the right of possession, and who are not custodians, provided always they be privy or consenting to the original trespass or wrong', the circumstances being that there had been a taking of goods 'without claim of title and which therefore involves a breach of the peace'.^[64] The instances provided by Branson in which a claim of title will arise are narrow; and they exclude some persons who have taken possession of goods in the genuine belief they are entitled to do so but whose conduct is unwittingly tortious, such as those who buy innocently from thieves. Such persons would, however, be protected from force under Branson's criteria for they would not be privy to the original trespass or wrong.

It is arguable that the broad concept of 'colour of right' or 'claim of right' may be more satisfactory here, and that there is no need to limit the category of protected people to those who assert a claim of title of the kind postulated by Branson. Provided a person is in possession of goods with the honest, albeit erroneous, belief that he or she is entitled to such possession, the use of force should be limited and the disputing parties should be required to have recourse to law to settle the question of title. These concepts are discussed further below.

It was pointed out by the UK Law Reform Committee in considering the law of recaption that it is 'of the essence of a good law on the subject that the existence of the circumstances which justify any particular measure of self-help should be readily ascertainable at the time'.^[65] The current law, which requires the parties to understand complex concepts of property rights, does not, it is suggested, fulfil the criterion that the existence of recaption rights should be readily ascertainable. A tortfeasor lacking such any claim of right has no ground, legally or morally, to defend his or her possession; and as such will be aware of the other party's higher legal and moral ground to justify the retaking of possession. That other party may, in exercising force, be unaware of the true state of mind of the person withholding possession and so will be taking a risk that his or her use of force is legally excusable. However, it is submitted that it is impossible to lay down a rule that a precondition for the use of force is that both parties correctly understand the facts and true legal position. This conclusion was, it seems, reached by the UK Law Commission when it considered the matter, for it decided that no hard and fast rule could be stated. In consequence, although it considered that the law should be clarified, the difficulties inherent in doing so precluded the Committee from recommending any major change in the current law.

II. STATUTORY CONTROL OF RECAPTION

Against this unsatisfactory common law background, the Crimes Act 1961 provides:

Section 52 Defence of movable property against trespasser

(1) Every one in peaceable possession of any movable thing, and every one lawfully assisting him, is justified in using reasonable force to resist the taking of the thing by any trespasser or to retake it from any trespasser, if in either case he does not strike or do bodily harm to the trespasser.

Section 53 Defence of movable property with claim of right

(1) Every one in peaceable possession of any movable thing under a claim of right, and every one acting under his authority, is protected from criminal responsibility for defending his possession by the use of reasonable force, even against a person entitled by law to possession, if he does not strike or do bodily harm to the other person.

Section 54 Defence of movable property without claim of right

(1) Every one in peaceable possession of any movable thing, but neither claiming right thereto nor acting under the authority of a person claiming right thereto, is neither justified in nor protected from criminal responsibility for defending his possession against a person entitled by law to possession.

Several points may be made about these provisions.

First, the justification provided in these sections applies in the context of both crime and tort. The word 'justified' is defined as meaning not guilty of a criminal offence, and also not liable to any civil proceedings.[66] The sections will therefore provide a defence to a claim in tort in the appropriate circumstances.

Second, it is not clear to what extent these statutory provisions codify the law relating to recaption. This is because s 20 of the Crimes Act provides:

Section 20 General rule as to justifications

(1) All rules and principles of the common law which render any circumstances a justification or excuse for any act or omission, or a defence to any charge, shall remain in force and apply in respect of a charge of any offence, whether under this Act or under any other enactment, except so far as they are altered by or are inconsistent with this Act or any other enactment.

In examining these sections, it appears that s 52 is the only provision which expressly covers an act of recaption so as to provide a defence to a claim in tort. A person in peaceable possession may use reasonable force against a trespasser not only to resist the taking of the thing but also to retake it. Although the right to retake is accorded to 'a person in peaceable possession', it is clear that this cannot be read literally; the right to retake must be available to one who has lost the physical possession of the goods to the trespasser and so is no longer in *de facto* possession. The phrase 'peaceable possession' is not defined in the Act. In *Singh v Police*[67] Williams J referred to *R v Born With A Tooth*[68] as providing assistance; in that case it was said that 'peaceable' is not synonymous with 'peaceful', but meant a possession not seriously challenged

by others.[69] If it were otherwise, then every property dispute could be legitimately resolved by force. This would be inconsistent with the object of the law, which was to confine the defence only to those whose possession has not been seriously questioned by somebody before the particular incident of force occurs.

It is clear that the protection afforded by the section applies only in the case where the goods are being removed, or have been removed, by a trespasser. The word 'trespasser' is not defined in the Act. Assuming that it has the meaning used in the tortious sense, recaption will provide a justification for the use of force only against one who has performed an act of direct and physical interference against the person in peaceable possession. As described above, the original obtaining of goods by an act of trespass is necessarily always unlawful. It would seem however that acts of conversion or detinue, unless they include trespass, would not be covered by s 52, even if such acts were unlawful from their inception. Accordingly, the section would not allow recaption from, for example, a purchaser from a thief, even though the purported purchase constituted an act of conversion and so was tortious at its inception. Indeed, s 52 would not allow recaption in the circumstances of any of the four cases of *Blades v Higgs*, *De Lambert v Ongley*, *Devoe v Long* or *Toyota*. In none of those cases was the person refusing to return the goods a trespasser, for each of them had come into possession of the goods without any act of direct interference with the possession of the person entitled to them. Nor would *Slater v A-G* come within the wording of the section.

Sections 53 and 54 involve the concept of 'claim of right' which means, in this context, a claim to, or belief in, entitlement which is honestly or genuinely held, even if there exists no foundation for it or the belief is unreasonable.[70] Under s 53, those in peaceable possession of movable things may use reasonable force (but not strike or do bodily harm) to defend their possession if that possession is under a claim of right. The protection afforded here, however, is against criminal liability only, so the user of force in such circumstances does not have a statutory defence against a tort action. By contrast, one who is in peaceable possession of a thing but without a claim of right has no protection against either criminal or tortious liability in defending his or her possession against another who is legally entitled to it.

In relation to protection from liability in tort then, the combined effect of ss 52-54 is, in summary, that a person whose right to possession of a thing has not previously been seriously challenged may use reasonable force (but not strike or do bodily harm) against a trespasser to defend or retake the possession. Outside these circumstances, one who is in peaceable possession of property and uses force to defend it against the person who is legally entitled to it has no defence to a tort action under these provisions, even though he or she may assert a claim of right. Clearly, the principle emerging from these sections do not cover the whole range of possible circumstances which may arise in recaption cases. In particular, s 52 covers only one circumstance in which possession is wrongful from its inception, namely, the act of a trespasser. The section does not expressly cover other 'unlawful from inception' cases and so would not justify, for example, an owner's forceful retaking of goods from one who had knowingly received them from a thief. There was no mention of these Crimes Act provisions in *De Lambert v Ongley*; and in *Singh*, Williams J appears to have assumed that the common law of recaption remained in force and had not been displaced by the Crimes Act provisions. It therefore seems that the Crimes Act defences do not, and cannot, constitute a code; and nor have they altered the common law or are so inconsistent with it as to have displaced it as provided in s 20.

III. THE DEGREE OF FORCE

In three States of Australia, legislation permits recaption of chattels by 'such force to overcome resistance as is necessary to obtain possession, provided it is not likely to cause death or grievous bodily harm' .[71] In the Toyota Finance case, Handley JA commented, obiter and without further discussion, that these provisions codified the common law, and that in this context the common law and Australian statute law were broadly the same. In New Zealand, the permitted level of force is generally described as being 'reasonable'. This was said to be so in both *De Lambert v Ongley* and in *Slater v A-G*; and s 52 of the Crimes Act also speaks of the use of 'reasonable' force against a trespasser. It has been suggested that 'reasonable' in this context means 'necessary'; Branston, for example, observes that 'the amount of force which one is justified in using is a matter of dispute, but now it would seem that whatever force is necessary is also justified.'[72] Clearly, this statement cannot stand without qualification, for both statute and the common law place limits on the amount of force which is justified for recaption. In New Zealand, it has been suggested that 'reasonable' and 'necessary' mean essentially the same thing, and that the degree of force allowed must be assessed on a standard of objective reasonableness.[73] The tests for such limits have been stated in variable language and in different contexts, and tend to be influenced from the circumstances of each case. It has also been judicially observed that, whatever force may be reasonably or necessary, the defence of one's property is not broader than the defence of one's person.[74] In questioning generally any right for one to retake his own goods by force, Landon observes that, whatever the circumstances in which such retaking may be permitted, 'at all events, maim[75] or wounding is not justified for this cause'.[76] In *De Lambert v Ongley* the defendant struck the plaintiff a blow and knelt on him when he was on the floor. Sim J said that the defendant had used 'much more force and violence than was necessary to obtain possession of the receipt'[77] and that, although some force could lawfully have been used in the circumstances of the case for the recaption, that which was in fact used was excessive. Sim J also remarked that the rules in this context were the same as those applicable to the ejectment of a trespasser on land and that 'beating, wounding and knocking the party down'[78] would not be justified. In *Slater v AG*, the use of pepper spray by the police to assist the owner of a car to recover it at the termination of the hiring was held to be unreasonable; and this was so whether the police were acting as the agent's owner or in the execution of their duty as police officers.

The 'reasonable force' to achieve the specified object which is permitted by s 52 of the Crimes Act is circumscribed by the requirement that there must be no 'strike' or 'bodily harm' done. In *Hastings v Police*[79] the issue was whether a push or shove to the complainant's chest was a 'strike', which is not defined in the Act. Priestley J observed that it was not easy to provide a definition; and that some meaning must be given to the legislative prohibition against striking, such a meaning being nonetheless one which preserved a realistic and reasonable range of bodily contact which was clearly envisaged by the expression 'reasonable force'. The Oxford English Dictionary definition of 'to strike' was essentially 'to deal a blow, to hit'; and these definitions provided some assistance. Priestley J held that 'striking' differed from actions involving pushing, holding, or physically obstructing a person, although it would be possible for a push or a shove to reach such a level of force that it might constitute a 'strike'. Similarly, in

Galvin v Police[80] Bisson J considered that a push to the chest with an open hand with reasonable force would not normally be regarded as a 'strike'. In Galvin, Bisson J also considered the term 'bodily harm', which is not defined in the Crimes Act. Bisson J observed that 'to injure' was defined in the Act as 'to cause actual bodily harm'; 'bodily harm' should therefore be read as contrasting with 'grievous bodily harm', with the result that an injury to a trespasser under s 52 could be nothing more than some slight hurt or discomfort. In DPP v Smith[81] it was held that the cutting of another's hair without consent constituted actual bodily harm; it was not necessary that there be any bruising or bleeding, or any cutting or breaking of the victim's skin. These cases make it clear that the kind of physical harm or contact permitted by s 52 must be very minor or trivial. Further, a person may be 'injured' without proof of physical injury if a hysterical or nervous condition results from the physical assault.[82] Psychological effects which are merely trivial or transitory do not come into this category;[83] and nor do other emotional responses such as fear or distress, which do not amount to mental injury.[84]

IV. REFORM

The common law governing the circumstances in which a person may use force against another for the recaption of chattels is unclear. Statutory intervention may be desirable but, as the UK Law Reform Committee pointed out, it is an area which may touch the ordinary person's view of his or her fundamental rights and so the laying down of rigid rules presents difficulties.[85]

It is suggested that if reform were contemplated, and a blanket rule applied, an approach could be adopted which allows forcible recaption only where no claim of right is asserted by the person wrongfully in possession of chattels. Such a person, being aware of his or her lack of entitlement, is in no state of confusion or misunderstanding about his or her interest in the disputed goods and has no justification to defend his or her unlawful possession. This approach, which takes into account the state of mind of the parties, would do away with the need to classify the action of a wrongdoer as trespass, conversion or detainment and would not require consideration of the 'wrongfulness from inception' argument. A person who defended his or her wrongful possession, knowing it to be so, would in such circumstances be thereby committing an assault. In cases where a person in possession of goods, correctly or otherwise, asserts a claim of right, recourse to the law is the desirable way for the disputing parties to settle the matter.

1. The arguments for and against the existence of a right of recaption of chattels are stated in the Eighteenth Report (Conversion and Detinue) of the English Law Reform Committee Cmnd 4774, (1971).
2. Blackstone's comment that 'the public peace is a superior consideration to one man's private property' was cited by the Committee, *ibid*, 41.
3. 3 Comm 4, cited in *Anthony v Haney* [1832] EngR 394; 8 Bing 186, 192.
4. *R v Jones* [2006] 2 WLR 772, 801 (HL).
5. Lord Hoffmann cited this observation of Edmund Davies LJ in *Southwark LBC v Williams* [1971] Ch 734, 745.
6. The goods in *Blades v Higgs* [1861] EngR 693; (1861) 10 CBNS 713 were of this kind, being dead rabbits.
7. The reforms effected in the UK by the Common Law Procedure Act 1854 and the Judicature Act 1873 enabled orders of specific restitution to be made. At common law the order in a case of trespass or conversion was damages, and in detinue an unsuccessful defendant had the option of returning the goods or paying their value. Section 3 of the Torts (Interference with Goods) Act 1977 (UK) reflects the common law remedies relating to detinue; orders may be made for the delivery of goods and any consequential damages, or delivery with an option given to the defendant to pay their value and any consequential damages, or simply damages. No such legislation exists in New Zealand.
8. *Nash v Barnes* [1922] NZLJ 303 (Salmond J); *Cohen v Roche* [1927] 1 KB 169.
9. Branston 'The Forcible Recaption of Chattels' (1912) 28 Law Quarterly Review 262, 264.
10. Goode 'The Codification of Common Law' (1988) 14 Monash University Law Review 135.
11. *Harris v Lombard NZ Ltd* [1974] 2 NZLR 161.
12. *Flack v Chairperson, National Crime Authority* (1997) 150 ALR 153, 156 (FCA).
13. *Ibid* and see the cases concerning the rights of finders of goods in [12.5.2], in which this principle is consistently maintained.
14. *Ibid*.
15. [1994] 1 NZLR 406 (CA).
16. *Bolwell Fibreglass P/L v Foley* [1984] VR 97.
17. *Ibid* 161. The lien is enforceable by a sale of the goods in accordance with the Wages Protection and Contractors' Liens Act Repeal Act 1987, s 3.
18. The rights of bailor and bailee in such cases are described as concurrent: *North Central Wagon and Finance Co Ltd v Graham* [1950] 1 All ER 780 (CA). It may be that a bailee has not merely a right, but a duty, to recover converted goods: *Dorico Investments Ltd v Weyerhaeuser Canada Ltd* (1999) 73 Alta LR (3d) 30.
19. (1849) 3 Ex 339.
20. [1905] 2 KB 460.
21. [1950] 1 All ER 580 (CA).
22. [1902] P 42, 60, (Collins MR); and see also *Hepburn v Tomlinson (Hauliers)* [1966] AC 451.
23. (1997) 150 ALR 153 (FCA).
24. [1996] 2 NZLR 443, 445.
25. [1994] 2 NZLR 8, 11 (CA).
26. Compare the more cautious approach adopted in *Cuffv Broadlands Finance Ltd* [1987] 2 NZLR 343, 346 (CA), where the question of whether a plaintiff could recover more than

the amount of his own interest in converted chattels was said, obiter, to be 'perhaps a moot point'.

27. *East West Corp v DKBS AF 1912 A/S* [2003] EWCA Civ 83; [2003] 3 WLR 916.
28. See Tettenborn, 'Reversionary Damage to Chattels' [1994] Cambridge Law Journal 326 for a detailed discussion of this action.
29. [1930] NZLR 169.
30. The nature of 'permanent injury' is considered in, for example, *Candlewood Navigation Corp v Mitsui OSK Lines, The Mineral Transporter* [1986] AC 1, *The Jag Shakti* [1986] AC 337 and *HSBC Rail (UK) Ltd v Network Rail Infrastructure Ltd* [2006] 1 WLR 643 (CA).
31. [1989] 1 NZLR 723.
32. At 731 (Somers J). The matter has been settled in the United Kingdom by the passage of the Torts (Interference with Goods) Act 1977, s10, which provides that co-ownership is no defence to an action in conversion or trespass to goods where the defendant (a) destroys the goods, or disposes of the goods in a way giving a good title to the entire property in the goods or otherwise does anything equivalent to the destruction of the other's interest in the goods, or (b) purports to dispose of the goods in a way which would give a good title to the entire property in the goods if he was acting with the authority of all co-owners. It is the second limb of this provision which effected the alteration in the law which has now been achieved in New Zealand by *Coleman v Harvey*. For a discussion of conversion as between co-owners, see Derham, 'Conversion by Wrongful Disposal as Between Co-owners' (1952) 68 Law Quarterly Review 507.
33. *Baker v Barclays Bank Ltd* [1955] 1 WLR 822, 827 (Devlin J).
34. [1892] 2 QB 202.
35. (1911) 6 MCR 107.
36. This is stated in the Law Reform Committee Report, above n 1, [116].
37. 'This happens, when any one hath deprived another of his property in goods or chattels personal, or wrongfully detains one's wife, child, or servant; in which case the owner of the goods, and the husband, parent or master, may lawfully claim and retake them, wherever he happens to find them; so it be not in a riotous manner, or attended with a breach of the peace ... if therefore he so contrive it as to gain possession of his property again without force or terror, the law favours and will justify his proceeding.' (3 Comm 4).
38. This is subject to the statutory exceptions to the principle of *nemo dat quod non habet*, which enable an innocent purchaser to obtain a good title from a thief in the circumstances provided by those exceptions.
39. The mediaeval law is described by Branston, above n 9. It seems it was otherwise if the taker was caught on fresh pursuit: *Vaspor v Edwards* (1701) 12 Mod 658. If the trespasser was caught with the goods in his possession and the owner and others made oath that the goods had been taken, the trespasser could be put to death and the goods restored to the owner: see the description of this procedure in Ames, 'The History of Trover' (1897) 11 Harvard Law Review 277, 278.
40. Holdsworth observed that the law in mediaeval times attempted to repress self-help and describes the procedure: *A History of English Law* ii, 101.
41. The Oxford History English Law, at 739, describes this process.
42. *Blades v Higgs* [1861] EngR 693; (1861) 10 CBNS 713, 721.
43. *Hemmings v Stoke Poges Golf Club* [1920] 1 KB 720, 736-737.

44. Although urgent and ex parte proceedings to secure jeopardised goods are possible (see for example *Powell v Koene* [2003] DCR 341, in which ex parte temporary furniture and protection orders were obtained under the Domestic Violence Act 1995) delays of hours or days may still place goods at risk.
45. It has been suggested that the law moved towards this position as a result of the introduction of replevin: Wilshire's *Indermaur's Common Law* 613. Replevin was considered in *Menniev Blake* [1856] EngR 745; (1856) 119 ER 1078, 1080, where it was observed that 'as a general rule it is just that a party in the peaceable possession of land or goods should remain undisturbed ... until the right be determined and the possession shown to be unlawful. But where, either by distress or merely by a strong hand, the peaceable possession has been disturbed, an exception case arises; and it may be just that, even before any determination of the right, the law should interpose to replace the parties in the condition in which they were before the act done, security being taken that the right shall be tried, and the goods be forthcoming to abide the decision'. The Distress and Replevin Act 1908 now governs the law in New Zealand in this context.
46. [1861] EngR 693; (1861) 10 CBNS 713.
47. For example, a trustee yet to take possession may sue although the goods are in the actual possession of the beneficiary; as may an executor or administrator if the goods of the deceased are interfered with before probate or letters of administration are granted. The owner of a franchise to take wreck or treasure trove who has yet to seize the goods may maintain an action in the case of unlawful interference by another.
48. [1861] EngR 693; (1861) 10 CBNS 713.
49. Landon, for example, says that the reasons given in the case 'seem wrong, and the decision itself is contrary to the common law as understood in the thirteenth century. One who retook his own goods by force (save, perhaps, on fresh pursuit) was a trespasser and lost the goods.': F Pollock & P Landon, *Pollock's Law of Torts* (15th ed, 1951) 293.
50. [1924] NZLR 430.
51. *Blades v Higgs* was appealed to the House of Lords on another point, and the issue of reception was not questioned further.
52. The plaintiff succeeded however on the ground that the force employed by the defendant in the case exceeded what was reasonable.
53. (unreported, HC, Auckland, CIV 2005-404-003728, Keane J, 30 March 2006).
54. (2003)58 NSWLR101.
55. Ibid 131.
56. (2003)58 NSWLR101.
57. (1863) 2 SCR (NSW) 235.
58. (1904) 4 SR (NSW) 336. However, although the respective Courts in each case cited *Blades v Higgs* with approval, the issue in *Zimmler* was whether a right to enter land to retake goods depended upon the need to prove how the goods first came there; and Abbott concerned the effect of a licence to enter land and retake goods.
59. The competing 'sides' are listed at 104 by Handley JA.
60. [1951] 1 DLR 203.
61. *National Coal Board v JE Evans & Co (Cardiff) Ltd* [1951] 2 KB 861; *Everitt v Martin* [1953] NZLR 298.
62. *Wilson v New Brighton Panelbeaters Ltd* [1989] 1 NZLR 74.
63. This point was made in *Devoe v Long* [1951] 1 DLR 203.

64. Branson, above n 9, 266-7, citing Maitland as authority.
65. Law Reform Committee, above n 1, 41.
66. Crimes Act 1961, s 2.
67. [2003] NZAR 596.
68. (1992) 76 CCC (3d) 169,177.
69. This was also accepted in the criminal context in *R v Haddon* (unreported, CA 311/05, 9 May 2006): '[I]t is apparent that it is sufficient for an accused to have actual control of the property and peaceable possession is a possession hitherto not seriously challenged by others'.
70. See *Singh v Police* [2003] NZAR 596 for a review of the history of the term 'claim of right'.
71. See the Criminal Codes of Queensland, Tasmania and Western Australia, ss 276, 34 and 253 respectively.
72. Brandon, above n 9, and see the cases listed in fnn 2 and 3.
73. See *R v Haddon*, citing *R v Frew* [1993] 2 NZLR 731.
74. *R v Haddon*, citing *R v Scopelliti* (1981) 34 OR (2d) 524.
75. In New Zealand, it has been held that maiming involves the cutting or removing of part of a person's body: *R v Rapana and Murray* (1988) 3 CRNZ 256.
76. Pollock & Landon, above n 49.
77. Ibid 432.
78. Ibid.
79. (unreported, HC, Whangarei, AP 24/01, Priestley J, 19 July 2001); [2001] BCL 778.
80. (unreported, HC, Rotorua, M44/85, Bisson J, 22 April 1986).
81. [2006] 1 WLR 1571.
82. *R v Miller* [1954] 2 QB 282, 292.
83. *R v McArthur* [1975] 1 NZLR 486.
84. *R v Chan-Fook* [1993] EWCA Crim 1; [1994] 1 WLR 689. See, further, Simester & Brookbanks, *Principles of Criminal Law* (1998).
85. Above n 1,41.